83 - 2063

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

DR. GERALDINE FENNELL,

on behalf of herself and all others similarly situated,

PETITIONER,

V.

WARNER LAMBERT COMPANY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Geraldine Fennell, PhD

59 Rennell Street
Bridgeport, CT 06604

Telephone: (203) 335-3832

Pro se

5388

QUESTION PRESENTED FOR REVIEW

The lower courts abused judicial discretion in granting/affirming defendant's motion to dismiss for failure to prosecute when:

- Defendant relied in its Rule 41(b) motion on discovery issues that are properly treated under Rule 37 (Societé internationale pour participations industrielles et commerciales v. Rogers 357 US 197), a rule it did not use,
- The appeals court mistakenly equated the present case with Chira v. Lockheed Aircraft, 634 F 2d 664 (2d Cir. 1980), and with Lyell Theatre v. Loews, 682 F 2d 37 (2d Cir. 1982), in each of which defendant had availed itself of Rule 37,
- The true state of affairs on discovery is clouded due to substantial errors of fact regarding the record that appear in the district court's ruling (App. C),
- The lower courts did not note defendant's

failure to do or permit discovery,

- In granting defendant's motion to dismiss, the district court failed to consider the entire record thus omitting all reference to plaintiff's substantial and well-documented (in at least six items on record) explanation for a period of sparse docket entries,
- Had the district court considered the attorney-client relationship in light of Link v. Wabash Railroad, 370 US 626 (1962), as the appeals court suggests is proper, it would have appreciated that plaintiff's explanation for the period of sparse docket entries is an issue of responsible litigation,
- The lower courts have arrived at factual conclusions without evidentiary determination.

C O N T E N T S

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,1984

NO._____

DR. GERALDINE FENNELL,

on behalf of herself and all others similarly situated

PETITIONER,

v.

WARNER LAMBERT COMPANY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Geraldine Fennell, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 25, 1983.

OPINION BELOW

The court of Appeals entered its de-

cision affirming the granting of defendant's motion to dismiss on November 25, 1983. A copy is attached (Appendix A).

The Court denied petitioner's petition for rehearing and suggestion for rehearing en banc on March 13, 1984. A copy is attached (Appendix B).

JURISDICTION

On November 25, 1983, the Court of Appeals entered judgment affirming the granting of defendant's motion to dismiss (App. A). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).[1]

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging. . . the right of the people to petition the Government for a redress of grievances.

[1] No other petitioner is involved.

United States Constitution, Amendment V:

> Nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Under Title VII of the Civil Rights Act of 1964, 42 USC ¶2000e et seq., I filed my complaint against Warner Lambert in federal district court in June, 1977 (Record on Appeal 1), alleging sex discrimination in employment and retaliation. During the following year, my attorney at that time, Elizabeth Spahn, complied with defendant's production request by (ROA 11) producing and offering to produce most of the requested documents. We objected to two paragraphs (11 and 17). The bulk of the documents at issue are, by definition, documents of which defendant had copies prior to making the request (e.g., correspondence, contracts between plaintiff and defendant, defendant's

personnel administration materials relevant to plaintiff's position. As to these, we agreed to make available those which were in plaintiff's but not defendant's possession.

My attorney also prepared, served on Warner Lambert,and filed interrogatories (ROA 12), and agreed to a date for Warner Lambert to take my deposition. In July, 1978, following extensions of the period for responding, Warner Lambert objected to answering each and every interrogatory (ROA 15). In August, 1978, the court, sua sponte, sustained objections to about half of the interrogatories and overruled the objections to the remainder(DOCKET p. 1). Warner Lambert obtained additional time to respond (ROA 16, 17).

Due to my attorney's acceptance of employment in another state, I had to find new counsel and I notified Warner Lambert's attorneys that I would not be able to appear

for deposition (ROA 18). My new attorney, Frank Cochran, entered his appearance in October, 1978 (ROA 19, 27) and, in November, 1978, met with three of Warner Lambert's attorneys to discuss defendant's objections to the interrogatories. Defense counsel declined to discuss the objections until after my deposition had been taken. Warner Lambert also raised issues relevant to document production that had been exhaustively covered with previous counsel in 1977 (Eginton to Cochran 11/15/78, appended to ROA 54). Shortly thereafter, Mr. Cochran stipulated that Warner Lambert need not respond to plaintiff's interrogatories "until after further application for such compliance"(ROA 20) and, in December, 1978 made a motion for partial summary judgment to strike Warner Lambert's second through sixth affirmative defenses (ROA 21, 22).

To aid in preparing their response to the motion, Warner Lambert requested addi-

tional documents (Eginton to Cochran 1/22/79 appended to ROA 54). In response, plaintiff agreed to a compromise of objections to documents requested under par. 17 of the production request and provided copies of documents in February, 1979 (Cochran to Eginton 2/12/79, Eginton to Cochran 3/20/79 appended to ROA 54). Plaintiff also indicated continued adherence to previous counsel's response to defendant's production request (ROA 11) and the availability for copying at Mr. Cochran's office of my studies for Warner Lambert (Cochran to Eginton 2/12/79 appended to ROA 54).

In March, 1979, following extensions of time to respond (ROA 24, 25, 26) defendant answered the motion for partial summary judgment (ROA 28, 29). Oral argument on the motion was in April, 1979 and the motion was denied in January 1980 (ROA 33).

In May, 1979, Mr. Cochran told me I should

seek other counsel and, in December, 1979 moved to withdraw as counsel (ROA 31), a motion he adjourned (ROA 32). Exchanges between Mr. Cochran and myself followed.He made a second motion to withdraw in June, 1980 (ROA 34, 36),to which I objected in a letter to the court (ROA 35). Following a hearing in October, 1980 (ROA 37, 38), Judge Burns denied Mr. Cochran's motion in November 1980: "The movant having failed to demonstrate good cause, the motion is denied on the present record without prejudice to renewal" (DOCKET p. 3).

In December, 1980, Mr. Cochran phoned one of Warner Lambert's attorneys to enquire when they planned to take my deposition and to ask for answers to my interrogatories. In reply, Warner Lambert indicated no immediate interest in taking my deposition (Nichols to Cochran 1/13/81 appended to ROA 54). They made no reference to answering my interrogatories and again rais-

ed issues relating to document production that had been covered with previous counsel in 1977. Replying, Mr. Cochran again raised the question of defendant's plans for taking my deposition and indicated the need for answers to my interrogatories. He stated he would respond regarding document production "as soon as I have instructions from my client on that issue" (Cochran to Nichols 1/19/81 appended to ROA 54).

In April, 1981, the clerk sent a (local) Rule 16 notice of proposed dismissal to counsel of record. By letter dated May 21, 1981, Mr. Cochran responded in part as follows (ROA 39):

> Judge Burns ruled late in 1980 denying my motion for leave to withdraw as counsel for the plaintiff, well within the one year set on the criterion for dormancy. Further discussion between myself and Dr. Fennell have been protracted, but should be concluded in the next month or less. Accordingly, the case should not be dismissed.

The clerk replied extending the time to "respond to the Rule 16 notice to Septem-

ber 22, 1981" (ROA 40).

In June, 1981, I wrote to Judge Burns requesting that she reconsider Mr. Cochran's motion of June 1980 to withdraw as my attorney. I mentioned that I had not heard from Mr. Cochran since March 1981 although I had written to him three times and added (ROA 41):

> ..I want to ask you to turn Mr. Cochran's motion over to another judge or to a magistrate so that Mr. Cochran will not feel inhibited, as he indicated he was in your presence, about stating his reasons for wanting to withdraw as counsel."

After further efforts on my part (ROA 42, 43), the clerk issued a briefing schedule for "plaintiff's second motion to withdraw as counsel," dated November 17,1981 (ROA 44). Presumably because Mr. Cochran did not file a memorandum in support of the motion by November 30, 1981 Magistrate Latimer denied the motion on December 18, 1981 (DOCKET p. 3).

By letter dated November 30, 1981 to Magistrate Latimer, an attorney for Warner

Lambert requested an extension of time to "December 24 to respond to the renewed motion to withdraw" (ROA 46) and in a hand-delivered letter to the magistrate, dated December 22, 1981 requested that the action be dismissed "for failure to comply with Local Rule 16 by September 22, 1981"(ROA 47).

In late December 1981 and early January, 1982, I had spoken by phone with various persons in the offices of the clerk, of Magistrate Latimer and of Judge Burns. I learned that one of Warner Lambert's attorneys had written to Magistrate Latimer requesting that my case be dismissed. I then phoned and wrote to the clerk, opposing the dismissal of my case, saying in part (ROA 48):

> I certainly have been doing all I could to get my case moving and, apparently, some more time is still needed to settle the question of Mr. Cochran's appearance on my behalf.
>
> I don't know what additional information you might need from me but I shall be happy to answer any questions you may have about this matter.

I also learned that a settlement conference under the aegis of Judge Zampano was going to be scheduled and it was suggested that I might use that conference as a means of seeking clarification of Mr. Cochran's reasons for wanting to withdraw as counsel. A meeting took place attended by Judge Zampano, Frank Cochran and myself without, however, solving any of the problems in the lawyer-client relationship. Later, the case was sent back to Judge Burns without resolution.

Judge Burns held a status conference on December 14, 1982. Her ruling on defendant's motion to dismiss reports (p. 5):

> At the close of the conference the Court instructed counsel that it would entertain motions to compel and a motion to dismiss. Thereafter, on December 29,1982 defendant filed its motion to dismiss and, on January 18, 1983, plaintiff moved to compel answers to interrogatories dated May 3, 1978. Magistrate Latimer denied both motions by endorsement on February 10, 1983, and both parties filed objections to those rulings.

Under Local Rule 2 for United States

Magistrates, both motions came before the Court for de novo determination. The Court granted defendant's motion to dismiss which was affirmed by the second circuit court of appeals. In May 1984, I moved under Rule 60(b)1 for relief from judgment on grounds of substantial factual errors in the Ruling on defendant's motion to dismiss.

REASON FOR GRANTING THE WRIT

Errors of fact and law resulted in the dismissal of my case from the district court and, again, in the appeals court's affirmation of dismissal. I ask this court to intervene so that I shall not unjustly be deprived of the opportunity to have my case against Warner Lambert tried on its merits.

The relevant wording of Rule 41(b) is as follows:

> . . . for failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may

> move for dismissal of an action or any claim. . .

In the present case, where is the behavior that permits a Rule 41(b) dismissal?

1. There was no "failure to prosecute." The district court's ruling acknowledges that the case was prosecuted diligently in part. There was a period of sparse docket entries for which a substantial explanation exists and is well documented. But plaintiff never failed to respond to a trial or pretrial calendar or any other step necessary to bring the case to trial.

2. There was no failure by plaintiff "to comply with these rules." As plaintiff's affidavit shows, defendant never moved to compel production and its objections to all of plaintiff's discovery requests violated the spirit of the discovery rules.

3. There was no failure to obey an "order of court."

In what follows, I shall briefly indicate some of the errors that led to the

dismissal of my case.

1. Erroneous Use of Rule 41(b) in regard to discovery issues.

Rule 41(b) applies particularly to the trial stage of litigation and is not available to use in connection with discovery issues. (Societé, supra). If it were true that there had been a "delay in effecting agreed discovery," Warner Lambert had a fully adequate series of remedies under Rule 37(b)2. But defendant chose not to proceed under that applicable rule, possibly because it had most of the disputed documents in its possession.

2. Appeals court mistakenly equates the present case with Chira, supra, and Lyell, supra.

The appeals court states: "A delay in effecting agreed discovery is a proper factor to be considered in deciding whether to dismiss a case under rule 41(b). See e.g., Chira," and also: "No clear abuse of dis-

cretion is shown. See, e.g., Lyell . . "

In Chira, however, the defendant first obtained an order setting an outside time for discovery under rule 37(b)2, before moving to dismiss under Rule 41(b). To the extent that the statement of the appeals court implies that discovery issues may be a ground for dismissal under Rule 41(b) without any attempt to secure a Rule 37 order, it is in plain conflict with both Rule 37 and the supreme court opinion in Societé.

Similarly, in Lyell, there is a procedural history vastly different from my case, including the fact that, in Lyell, a motion for reconsideration of dismissal was denied because excuses asserted by plaintiff were not "reflected in the record or raised at any time prior to dismissal" (p. 40). In my case, plaintiff's problem was stated in numerous contemporaneous communications with the Court (ROA 35, 37, 38, 41, 42, 43).

3. Substantial errors of fact in the dis-

trict court's ruling cloud the discovery history.

Opposing counsel differ in regard to an agreement on discovery. Defendant talks of a three-part agreed sequence: document production by plaintiff, deposition of plaintiff, possibly followed by defendant's answers to plaintiff's interrogatories (ROA 54 par. 9). Defendant takes the position that since document production has not occurred nothing else can happen (e.g., ROA 54 par. 14). Plaintiff's view of the agreed upon sequence involves two stages: plaintiff's deposition then defendant's answers to plaintiff's interrogatories (e.g., Cochran to Nichols appended to ROA 54). Plaintiff's compliance with defendant's production request has been attended to and plaintiff's answer to the production request is on file.

The district court accepts defendant's rather than plaintiff's view, mainly,

because it, like defendant, holds that plaintiff has yet to comply with defendant's production request (App. C, p.10). But plaintiff's response to each paragraph in the production request is on file (DOCKET 11).

The district court is also in error regarding the evidence that supports defendant's version of the discovery agreement. The ruling (App. C, p.13) is clearly wrong in stating that there is an agreement "long ago embodied in a stipulation and reflected in correspondence" that "document production would precede other discovery." The only stipulation relating to discovery is that of November 1978 and it speaks only of defendant's response to plaintiff's interregatories (DOCKET 19 and ROA 20).The only supporting correspondence originates from defendant (Eginton to Cochran 11/15/78 appended to ROA 54).

The district court wrongly characterizes a letter from defense counsel of 1/22/79

as notifying plaintiff's counsel of "the specific documents it was requesting." In fact, the letter in question simply repeats verbatim defendant's broad production request to which plaintiff's response was on file since October 1977.

4. Defendant's violation of the spirit of discovery rules.

Defendant hindered the efficient progress of the litigation. Warner Lambert refused to confer about and did not move to compel discovery. Warner Lambert violated the spirit of the discovery rules by:

a. Objecting to every one of plaintiff's discovery requests, for the most part frivolously,

b. Failing to avail itself of discovery opportunities plaintiff made available (my deposition, my projects),

c. Ignoring the fact that I had filed a complete response to their production request and attempting to compromise

production issues, in place of moving to compel,

d. Creating a supernumerary quarrel about production of documents most of which it actually had in its possession,

e. Interposing this redundant discussion about document production as a block to other discovery (plaintiff's deposition, defendant's answers to plaintiff's interrogatories).

5. Based on the content of the district court's ruling and the statements in the appeals court opinion, it is factually inaccurate to say, as the appeals court states, that "the trial judge considered relevant aspects of the history of the litigation in making her determination that the case should be dismissed."

In noting that "The trial court may properly consider the relationship between the litigant and her attorney. See e.g., Link v. Wabash Railroad", the appeals court

overlooked the fact that the district court did not take the lawyer-client relationship into account:

a. Internal evidence in the Ruling (App. C) indicates that the district court did not consider the relationship between the litigant and her attorney. The matter is not discussed, Link is not cited in the Ruling in any context, and the District Court did not cite cases on the issue of lawyer-client relations.

b. If the district court had considered the lawyer-client relationship in the light of Link, and specifically what I was reporting about the relationship in my communications with the court, the outcome may have been different.

In holding clients responsible for their attorneys' actions, Link supports a client's right to information relevant to the litigation. In my letters to the district judge, I repeatedly stressed my need

for information and clarification from my attorney in order to be able to proceed with the litigation. The outcome could have been different in two respects:

i. The district judge may have seen her way to respond positively to my request for help in getting the information I needed. (Consider the list of unanswered questions in my letter to Judge Burns, October 1980, and my final sentence (ROA 38):

> Beyond requesting that Mr. Cochran's motion be denied, I shall appreciate anything you can do to cast light on my unanswered questions.

Consider also my request for guidance on other ways to handle the situation in my letter of June 1981 (ROA 41):

> I shall be glad to answer any questions you may have about this matter or hear your suggestions for other ways to deal with it.

ii. Having failed to respond substantively to pleas such as the above, Judge Burns could have considered the existence of the

problem as a factor explaining the sparse docket entries in the period from January through December 1982. As stated in SEC v. Everest Management, 466 F Supp, 167, 171 (SDNY 1979), a case cited in the Ruling (App. C p. 4):

> Dismissal for want of prosecution may be denied where a satisfactory explanation for plaintiff's delay exists.

6. An issue of exceptional importance arises because the lower courts' opinions rest on factual conclusions that are not based on evidentiary determination.

a. In stating that Fennell would not "allow the discovery procedure agreed upon in 1978 to proceed," and that "Fennell would not permit her attorney to withdraw," the appeals court states conclusions on issues where plaintiff and defendant assert different facts and where there has been no evidentiary hearing. On each issue, the appeals court favors defendant. Evidence is available and could be examined rela-

tive to these issues. It has not been examined.

i. Discovery. It is clear that plaintiff consistently maintained a very different version of the discovery dispute from the version defendant asserts. The appeals court, of course, relied on the ruling of the district court. However, in the context of a Rule 41(b) motion to dismiss, the dispute between plaintiff and defendant on the subject of discovery was not given the detailed examination it might have received in the appropriate context of Rule 37. Defendant has simply persistently proclaimed that plaintiff was in error on the matter of document production without putting these claims to an appropriate test in the form of a Rule 37 motion to compel production. It is not a foregone conclusion that defendant would have prevailed in a motion to compel production of the documents to which plaintiff objected.

ii. Attorney-Client. In their brief before the appeals court Warner Lambert, who can have no first hand knowledge of these matters, nonetheless present a view of plaintiff's lawyer-client relationship that is different from the one I presented in plaintiff's principal brief. In any event, the power to "permit" an attorney to withdraw rests with the court not the client.

b. In the absence of an evidentiary hearing, the courts must favor plaintiff rather than defendant. Already in a weaker position, procedurally, compared to a person who resists summary judgment, a person who resists dismissal is, surely, entitled to at least the procedural presumption favoring a party who resists summary judgment: Her version of the facts must be taken as true for a Rule 41(b) motion.

CONCLUSION

There is nothing in Rule 41(b) that permits dismissal in the present instance.

The district court did not dismiss my action sua sponte. In order to make a case for dismissal, defense counsel erroneously rely on:

1. A local rule which confers no substantive rights upon a defendant to insist that a case be dismissed.[2]
2. Defendant's claims regarding the existence of a discovery agreement that document production precede other discovery, which is recorded only in correspondence written by defense counsel.
3. Plaintiff's supposed failure to effect agreed discovery for which defense counsel had available, but did not use, the procedures of Rule 37.

Indeed, contrary to the claim of defense

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[2] "District court rule respecting dismissal in civil actions in which no proceeding has been taken for a period of two consecutive years is for administrative purposes, and confers no substantive rights upon a defendant to insist that a case be marked as dismissed." (Wholesale Supply Co v. South Chester Tube, 20 FRD 310, 310).

counsel, it is defendant rather than plaintiff who has impeded the progress of discovery.

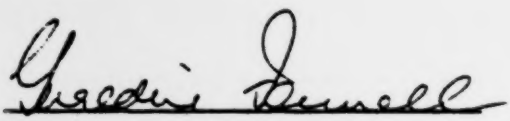
The rules of procedure and commentary on the rules regarding involuntary dismissal and summary judgment consistently express sensitivity to the constitutional requirement of due process, a concern that I do not find reflected in the opinions of the lower courts or the procedures that were employed in my case.One authority notes, for example:

> Indeed, there are constitutional limitations upon the power of a court, even in aid of its own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause (Societé, supra, 1094). For this reason the appellate courts scrutinize very carefully dismissals with prejudice made on these grounds. 9 Wright & Miller ¶2369 193.

In sum, I have a meritorious case against Warner Lambert which has not yet been heard. Events in the district court and the appeals court have prevented my

grievance against Warner Lambert from being resolved on its merits. Specifically, unconstitutional applications of procedural rules have abridged my right to "petition the Government for a redress of grievances" and have violated my right to "due process of law."

Respectfully submitted,



GERALDINE FENNELL
59 Rennell Street
Bridgeport, CT 06604
Telephone: (203) 335-3832

Pro se

DATED: 9 June 1984

APPENDIX

C O N T E N T S

DECISION OF SECOND CIRCUIT

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of November, one thousand nine hundred and eighty-three.

Present:

Honorable Irving R. Kaufman,

Honorable Ellsworth Van Graafeiland,

Circuit Judges,

Honorable Clement F. Haynsworth, Jr.,

US Court of Appeals, Fourth Circuit,

sitting by designation.

GERALDINE FENNELL, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

against

83-7473

WARNER LAMBERT COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

1. The trial court's dismissal of appellant's suit for failure to prosecute was not an abuse of discretion. In a motion for dismissal under Fed. R. Civ. P. 41(b), the trial court may properly consider the relationship between the litigant and her

attorney. See, e.g., Link v. Washburn Railroad Co., 370 US 626 (1962). In the instant case, appellant failed to prosecute for over four years, apparently because of a dispute with counsel. Fennell would not permit her attorney to withdraw, nor would she allow the discovery procedure agreed upon in 1978 to proceed. A delay in effecting agreed discovery is a proper factor to be considered in deciding whether to dismiss a case under Rule 41(b). See, e.g., Chira v. Lockheed Aircraft Corp., 634 F 2d 664, 668 (2d Cir. 1980). In sum, the trial judge considered relevant aspects of the history of the litigation in making her determination that the case should be dismissed. No clear abuse of discretion is shown. See, e.g., Lyell Theatre Corp. v. Loews Corp., 682 F 2d 37 (2d Cir. 1982).

2. Appellant's other assertions are equally without merit.

3. Accordingly, the judgment is affirmed.

ORDER OF SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 13th day of March one thousand nine hundred and eighty-four.

DR. GERALDINE FENNELL, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

v.

WARNER LAMBERT COMPANY,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellant, Dr. Geraldine Fennell, etc., pro-se,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,

Clerk.

by Francis X. Gindhart,

Chief Deputy Clerk.

RULING OF DISTRICT COURT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DR. GERALDINE FENNELL :

CIVIL NO.

V. :

N77-252

WARNER LAMBERT COMPANY :

RULING ON DEFENDANT'S MOTION TO DISMISS

This action, filed in 1977 by a former employee of defendant Warner Lambert Company who alleges she was unlawfully discharged on the basis of sex,[1] is before the Court for resolution of troublesome issues raised by a motion to dismiss for failure to prosecute. Pursuant to Rule 41(b) of the F. R. of Civ. P.[2] and Local

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[1] Plaintiff alleges defendant violated her rights under Title VII of the Civil Rights Act of 1964, 42 USC ¶2000e et seq.

[2] In relevant part, Rule 41(b) states: "for failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

Rule 16(a) of the Rules of Civil Procedure of the United States District Court for the District of Connecticut,[3] defendant urges dismissal on the grounds that plaintiff has not prosecuted the case diligently, has not conducted discovery necessary to prepare for trial and failed to explain why dismissal was inappropriate when required to do so by order of the clerk of the court under Local Rule 16(a). Defendant contends plaintiff's languor has prejudiced it because crucial witnesses have died, left the employ of defendant, or suf-

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[3] Local Rule 16(a) provides:

> In civil actions in which no action has been taken by the parties for one year, the clerk shall give notice of proposed dismissal to counsel of record on or before the first of October in each year. If such notice has been given and no action has been taken in any civil action in the meantime and no satisfactory explanation is submitted to the court within 30 days thereafter, the Clerk shall enter an order of dismissal. Any such order entered by the Clerk under this rule may be suspended, altered, or rescinded by the court for cause shown. (Emphasis added).

fered the usual dimming of memory that occurs with the passage of time. Plaintiff denies defendant's claim of prejudice and shifts the blame to Warner Lambert for the fact that this case has not progressed beyond preliminary stages of discovery. Notwithstanding the Court's reluctance to deprive any party of an opportunity for resolution of his or her case on its merits, the Court is of the opinion that this case is one of the few where the drastic remedy of dismissal is the proper sanction for plaintiff's failure to prosecute diligently.

DISCUSSION

There can be no question that this Court has the inherent power to dismiss a case from its docket because of a plaintiff's failure to prosecute the action. Chira v. Lockheed Aircraft Corp., 634 F 2d 664, 665 (2d Cir. 1980). This power should be exercised sparingly, however, and only where the entire procedural his-

tory of the case demonstrates that the plaintiff has not prosecuted the action with diligence. Merker c. Rice, 649 F 2d 171, 173-74 (2d Cir. 1981). While prejudice to the defendant is not a precondition to dismissal, its absence is a relevant consideration where the failure to prosecute is moderate or attributable to excusable neglect. Messenger v. United States, 231 F Supp. 328, 331 (2d Cir. 1956); SEC v. Everest Management Corp., 466 F Supp 167, 171 (SDNY 1979). Additionally, a defendant who has contributed to the problem should not be rewarded with a windfall dismissal when a lesser sanction will suffice. See Index Fund, Inc. v. Hagopian, 90 FRD 574, 580 (1981).

From its commencement on June 17, 1977, until the Court denied plaintiff's motion for partial summary judgment on January 3, 1980, this case was litigated diligently by both parties. Since early 1980, on the other hand, virtually the only action in

this case has been unsuccessful attempts by counsel for plaintiff to withdraw from the case. On December 14, 1979, plaintiff's attorney filed his first motion to withdraw. While that motion was still pending, counsel filed a second motion to withdraw on June 20, 1980. On November 25, 1980, this Court denied the first motion on the grounds that counsel had not shown the requisite good cause for withdrawal. Though the second motion was not similarly denied or otherwise endorsed, it appears the Court and the parties treated that motion as withdrawn without prejudice to renewal.

The next action in this case was initiated by the Clerk of the United States District Court for the District of Connecticut who, acting pursuant to Local Rule 16, notified plaintiff on April 29, 1981, that "[t]he case below is subject to being dismissed ... [u]nless some action is taken

or a satisfactory explanation of why it should not be dismissed is submitted to the Court within thirty (30) days ...." Three weeks later, by letter dated May 21, 1981, counsel for plaintiff advised the clerk of the court that the case should not be dismissed since his motion to withdraw was not ruled on until November 25, 1980, and because "discussions between myself and Dr. Fennell have been protracted, but should be concluded in the next month or less." In light of this response, plaintiff's period for complying with the Rule 16 notice was extended to September 22, 1981. Despite this extension, plaintiff did not prosecute the case and the next proceeding in the action was on November 17, 1981, when Magistrate Latimer, acting at the request of this Court, issued a briefing schedule on the second motion to withdraw as counsel. Although this procedure gave counsel a second op-

portunity to justify his motion for withdrawal, counsel ignored the briefing schedule and consequently the motion was denied on December 18, 1981. It should be noted that defendant, who obtained an extension of time to respond to the briefing schedule and who apparently was unaware that the motion had been denied, wrote to the magistrate on December 22, 1981, asking that the case be dismissed due to plaintiff's failure to take any action on the case by September 22, 1981, as required by the Rule 16 notice.

The Court did not act on the defendant's request to dismiss and the clerk of the court did not dismiss the action automatically for plaintiff's failure to comply with the Rule 16 notice. Instead, this Court referred the case to Judge Zampano for a pre-trial conference. A conference was held on March 26, 1982, but the case was not settled and still plaintiff took

no action to prosecute the suit. To ascertain the status of the case, this Court held a conference on December 14, 1982.Counsel for plaintiff suggested the Court should impose a final discovery schedule so the case could soon be ready for trial. Counsel for defendant, however, strongly objected to this recommendation and renewed his request that the action be dismissed for failure to prosecute. At the close of the conference the Court instructed counsel that it would entertain motions to compel and a motion to dismiss. Thereafter, on December 29, 1982, defendant filed its motion to dismiss and, on January 18, 1983, plaintiff moved to compel answers to interrogatories dated May 3, 1978. Magistrate Latimer denied both motions by endorsement on February 16, 1983, and both parties filed objections to those rulings.

In opposition to the motion to dismiss, which under Local Rule 2 for United States

Magistrates is before the Court for a de novo determination, counsel for plaintiff argues that he never disobeyed any order of the Court and that the lack of progress toward readiness for trial is attributable to defendant's consistent refusal to respond to outstanding interrogatories. As for the first contention, the file shows that plaintiff never complied with the Rule 16 notice that was extended until September 22, 1981. Although Magistrate Latimer considered a renewed motion to withdraw in late 1981, counsel cannot claim credit for renewing the motion since he never responded to the briefing schedule. In addition, the motion was not revewed within the time period established by the Rule 16 notice. Finally, inasmuch as defendant objected to the renewed motion to withdraw on the grounds that the case should be dismissed for failure to prosecute, it cannot be asserted that defendant acquiesced in the

continued status of the case as a pending action.

With respect to plaintiff's second argument shifting the blame to defendant, it is not supported by the record. Contrary to the position now taken by plaintiff, throughout the past three years the onus has been on plaintiff to comply with defendant's request for production of documents before defendant could be required to respond to plaintiff's interrogatories. Moreover, by Stipulation of November 21, 1978, it was agreed that defendant would not respond to plaintiff's first and only set of interrogatories "until after further application for such compliance ...." No such further application was made until January 18, 1983. In addition, as reflected in a letter to plaintiff's counsel on November 15, 1978, it was defendant's understanding that both sides would exchange certain documents

before proceeding to further discovery. By letter dated January 22, 1979, counsel for defendant notified plaintiff's counsel of the specific documents it was requesting. On February 12, 1979, plaintiff's counsel gave defendant various documents but objected to the production of others. Defendant responded with a letter dated March 20, 1979, in which counsel listed the documents received, observed that he could not reply to plaintiff's objection because it was not addressed to specific documents, and suggested "that we hold this discovery situation in abeyance until after the resolution of the Motion for Partial Summary Judgment ... ."

Plaintiff's motion for partial summary judgment was denied on January 3, 1980, and the next indication of an intent to litigate the case was in a letter of January 13, 1981, to plaintiff's counsel where counsel for defendant stated, in response

to a telephone inquiry regarding the scheduling of plaintiff's deposition, that "[d]efendant desires to take plaintiff's deposition as soon as possible ... [after we] complete our examination of plaintiff's documents." In response to this letter, plaintiff's counsel sent defendant a letter dated January 19, 1981, stating, "I will respond to your inquiry regarding production of documents as soon as I have instructions from my client regarding that issue." No response was forthcoming, however, and the next communication from plaintiff's counsel was a letter dated December 15, 1982, a day after the Court held a status conference. In his letter counsel took the position that he had "not agreed to defer compliance [with the interrogatories] at any time since December 29, 1980," when he asserts he requested compliance by telephone. This position seems to contradict that taken by counsel in his letter of January 19, 1981, and, in

any event, the stipulation of November 21, 1978, required plaintiff to make written application to the Court for compliance with the interrogatories. Thus, plaintiff's assertion that the delayed progress of the case should be attributed to defendant's "intransigent posture" is untenable in light of the agreement, long ago embodied in a stipulation and reflected in correspondence, that document production would precede other discovery.

Given this procedural history, necessarily reviewed here at length, the Court cannot fairly avoid the conclusion that this case has not been prosecuted with due diligence. In addition to plaintiff's complete noncompliance with the Rule 16 order, plaintiff has taken no action to prepare her case for trial since the Court denied her motion for partial summary judgment. Although dismissal is a harsh remedy, it must be recognized that "[d]elays have dan-

gerous ends, and unless district judges use the clear power to impose the ultimate sanction when appropriate, exhortations of diligence are impotent." Chira v. Lockheed Aircraft Corp., supra at 668.In this case, where plaintiff was put on notice of possible dismissal by a Rule 16 notice in 1981 but took no action until 1983, despite defendant's request for dismissal in late 1981, the Court reluctantly concludes that dismissal is appropriate.

CONCLUSION

For the reasons herein stated, defendant's objections to the ruling of Magistrate Latimer on its motion to dismiss for failure to prosecute are sustained and, after a de novo review, the motion to dismiss is granted.

SO ORDERED,
ELLEN BREE BURNS
USDJ

DATED: New Haven, Connecticut, 2 May 1983

JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT,

DISTRICT OF CONNECTICUT

DR. GERALDINE FENNELL :

CIVIL NO.

VS. :

N 77-252

WARNER LAMBERT COMPANY:

JUDGMENT

This cause came on for consideration on defendant's motion to dismiss before the Honorable Arthus H. Latimer, United States Magistrate, and on February 10, 1983, said motion having been denied, and, thereafter, the objection to said denial having come for consideration before the Honorable Ellen Bree Burns, United States District Judge, and a Ruling on Defendant's Motion to Dismiss having been filed on May 2, 1983, granting said motion, after a de novo review,

It is ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the defendant dismiss this action. Dated: 6 May 1983.

APPENDIX D-1